No. 16032

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FERNANDO S. FORFARI, APPELLEE

On Appeal from the United States District Court for the Northern District of California Northern Division

BRIEF FOR THE UNITED STATES OF AMERICA

GEORGE COCHRAN DOUB,
Assistant Attorney General,
ROBERT H. SCHNACKE,
~~LLOYD H. BURKE~~,
United States Attorney,

MORTON HOLLANDER,
BERNARD CEDARBAUM,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

CITATIONS

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JURISDICTIONAL STATEMENT

This is a suit against the United States under the Tort Claims Act to recover for personal injuries sustained by the appellee who, at the relevant time, was a civilian employee of a non-appropriated fund instrumentality of the United States. The injuries resulted from a fall down a staircase in a building owned and maintained by the Government and occupied by the Commissioned Officers' Mess of the Mare Island Naval Shipyard, Vallejo, California (R. 14-

15). The district court's jurisdiction was invoked under 28 U.S.C. 1346(b).[1]

On August 2, 1957, the district court filed a Memorandum and Order on the issue of liability, deciding that issue in favor of appellee (R. 10-12). At the same time, the case was set down for further hearing for the purpose of determining the damages sustained. After trial on the issue of damages, the court, on December 31, 1957, filed a second Memorandum and Order fixing appellee's recovery at $12,673.26 (R. 13-14). On February 5, 1958, the court filed its Findings of Fact and Conclusions of Law and entered a formal judgment (R. 14-19). Against this judgment, the court awarded the California State Fund Insurance Company a lien in the amount of $4,085.76 for workmen's compensation benefits paid to the appellee for the same injuries. From the Memorandum and Order of December 31, 1957, and from the judgment entered in favor of appellee, the United States has appealed (R. 19). This Court's jurisdiction rests on 28 U.S.C. 1291.

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[1] "* * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

STATEMENT OF THE CASE

Appellee was employed as a chef by the Mare Island Cafeteria System, which is a non-profit cooperative association of civilian employees of the Navy Department, organized and operated under Navy regulations for the purpose of supplying food to personnel at the Mare Island Naval Shipyard (R. 15). (App. *infra*, pp. 22-28).[2] The Cafeteria System was providing food service to the Commissioned Officers' Mess as a contract concessionaire under the supervision of the Cafeteria Manager (R. 66-72).

The staircase down which appellee fell is located in the Officers' Mess and leads from the kitchen in which he was performing his duties up to a wash room normally used by the cafeteria employees (R. 26-27, 48). Under Navy Regulations, the Commissioned Officers' Mess occupied the government-owned building free of charge, and the Government retained responsibility for maintenance of the building. The district court found that appellee's injuries were proximately caused by the negligence of the Government in failing to provide a hand rail on the staircase, in permitting the protrusion of steel strips at the edge of each step, and in failing to light the staircase properly (R. 15). Appellee was found to have been free of contributory negligence.

With respect to appellee's employment relationship to the Government, the district court found that although the Commissioned Officers' Mess and the Cafeteria System were both non-appropriated fund instrumentalities of the United States, and although

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[2] "App." references are to the appendix to this brief.

the appellee was an employee of the latter agency, he was not an employee of the United States precluded from maintaining suit under the Tort Claims Act (*ibid.*). The court also concluded that under the laws of the State of California, liability would be imposed upon the United States if it were a private person.

By reason of the injuries incurred in the accident upon which appellee based his claim, he received medical and hospital care paid for by the California State Fund Insurance Company in the amount of $4,085.76 (R. 16). This company was the compensation insurance carrier for the Cafeteria System (appellee's employing agency), and the amount of the compensation award was fixed by the Industrial Accident Commission of the State of California. The insurance company was given a lien in this amount against appellee's judgment.

SPECIFICATION OF ERRORS

The district court erred:

1. In holding that appellee was not an employee of the United States.

2. In failing to hold that appellee was precluded from maintaining a suit under the Federal Tort Claims Act by virtue of his status as an employee of a non-appropriated fund instrumentality of the United States.

3. In finding that under the law of the State of California, liability would be imposed upon the United States if it were a private person.

4. In awarding judgment in favor of appellee.

SUMMARY OF ARGUMENT

As an employee of a non-appropriated fund instrumentality of the United States at the time of his injury, appellee was an employee of the federal government precluded, like all other federal employees, from maintaining a suit under the Tort Claims Act for injuries sustained in the course of his employment. The record clearly establishes, as the district court found, that the Mare Island Cafeteria System, which employed the appellee as a chef, is a non-appropriated fund activity and an integral part of the Department of the Navy. *Nimro* v. *Davis*, 204 F. 2d 734 (C.A.D.C.), certiorari denied, 346 U.S. 901. The Cafeteria System is a non-profit organization which was established pursuant to Navy Regulations and which is operated under close government supervision by military and civilian personnel of the Navy Department. It is the legal equivalent of post exchanges and officers' clubs which have been held to be arms of the Government possessing full governmental immunity from taxation and from suit. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481.

It is well established that compensation remedies provided by the Government for injuries incurred by federal employees are the exclusive remedies which those employees have against the Government and constitute the Government's sole liability with respect to such injuries. *Johansen* v. *United States*, 343 U.S. 427; *Feres* v. *United States*, 340 U.S. 135; Federal Employees Compensation Act, 5 U.S.C. 757 (b). This rule places the United States in the same relationship to its employees as private employers

are placed by virtually every state workmen's compensation statute. And the rule applies despite the absence of an express exclusiveness provision in the statute providing for the compensation remedies.

Moreover, in the present case, if the United States were a private employer, it would not be liable in tort to the appellee and, therefore, cannot be held liable under the express terms of the Tort Claims Act. Appellee received a compensation award from the Industrial Accident Commission of the State of California for full benefits provided by the California compensation system. Under California law, this award constitutes an employee's exclusive remedy against his employer and precludes any further liability on the employer's part for the same injuries. *Duprey* v. *Shane*, 39 Cal. 2d 781, 789-90, 249 P. 2d 8, 13.

In addition, the Government by this award completely met its legal obligation, established by act of Congress, to provide compensation to an employee of a non-appropriated fund instrumentality in an amount not less than that required by the laws of the State where the instrumentality is located. This compensation remedy provided by the Government through its instrumentality is the employee's exclusive remedy, even if he is not deemed "an employee of the Government" because the financial burden of his compensation is borne by non-appropriated funds. *Aubrey* v. *United States*, 254 F. 2d 768 (C.A.D.C.).

ARGUMENT

Appellee's Status As A Civilian Employee Of A Non-Appropriated Fund Instrumentality Of The United States Precludes Him From Maintaining A Suit Under The Tort Claims Act For Personal Injuries Sustained In The Course Of His Employment

A. *The Cafeteria System is a non-appropriated fund instrumentality of the United States.*

As noted above, at the time appellee sustained his injuries, he was employed as a chef by the Mare Island Cafeteria System. The district court found that the Cafeteria System is a non-appropriated fund agency of the United States (R. 15). This finding is clearly correct.

The Cafeteria System is operated in accordance with official naval policy as set forth in Navy Civilian Personnel Instruction 66 (App., *infra*, pp. 22-28). This regulation authorizes the establishment of various employee services and governs their operations. The primary purposes of this program are (1) to make available for civilian employees facilities which reduce interruptions of work to a minimum and (2) to provide bases for the development of interest in their jobs and places of work (Sec. 2-1, App., *infra*, p. 22). The services are established and supervised as a command function, there is no proprietary interest in their funds, and any profits derived from their activities do not accrue to any individuals. "Only those services which contribute to morale, job interest, cooperation, better attendance, health, and productive output are considered justified under this program." (Sec. 2-2, App., *infra*, p. 22). Em-

ployee services are declared by the regulations to be "an integral part of the Industrial Relations Program" and to be essential where "the absence of adequate community and business resources causes troublesome work interruptions." (Sec. 2-3, App., *infra*, pp. 22-23).

As a part of this general program, it is the policy of the Navy to make available necessary assistance and facilities so that civilian employees of the Navy will benefit from in-plant food service. (Sec. 4-1, App., *infra*, p. 23.) The food service is operated for the benefit of all employees of a particular activity through the medium of employee representatives. (Sec. 4-2, App., *infra*, pp. 23-24.) These representatives, who are normally appointed by the head of the activity, determine the operating policies and procedures, subject to his approval. The Industrial Relations Officer of the Navy is usually an *ex-officio* member of the System and serves as the liaison between that body and the head of the activity. (Sec. 4-2, App., *infra*, pp. 23-24.) The Cafeteria System decides whether to utilize an operating manager or a concessionaire, but again such decision is subject to the approval of the head of the activity. Should it decide upon a concessionaire (which it did not in this case), a contract is negotiated and signed by the head of the activity if he approves its terms and the use of the facilities. In addition, the contract is post-audited by the Office of the General Counsel. (Sec. 4-3, App., *infra*, pp. 24-25.)

The regulation requires that the food service be administered in conformance with law and that it

pay all necessary taxes. Only cash sales are to be made, and semi-annual audits must be conducted. The head of the activity receives the audits, establishes the rate of earnings, and determines the amount of insurance to be maintained by the food service. The sale of intoxicating liquor is prohibited unless expressly permitted by the Secretary of the Navy. The food service is operated in available government buildings, and all permanent improvements and equipment become the property of the Government. (Sec. 4-4, App., *infra*, pp. 25-27.)

The Court of Appeals for the District of Columbia Circuit has squarely held that employee food services of the Navy Department, established under Navy Civilian Personnel Instruction 66, are instrumentalities of the United States entitled to full governmental immunity from suit. *Nimro* v. *Davis*, 204 F. 2d 734, certiorari denied, 346 U.S. 901. The rationale of the decision is the one that we have outlined here. The applicable regulation is described as "a comprehensive set of directives to govern the establishment and operation of employee services," and the court noted the purposes and policies of this program as set forth in the regulation. 204 F. 2d at 735. The court stated (204 F. 2d at 736):

> * * * They serve the same purpose in establishing and operating employee services in the Navy that War Department regulations serve in connection with post exchanges. In each the underlying purpose is the same, i.e., promotion of the Government's interests in the conduct of its military and naval activities.
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> * * * *

> * * * We think that relationship is such as to constitute the Board an arm of the Government, performing a governmental function as an integral part of the Navy Department, made up of the Department's own personnel, acting officially under authority and direction of the Secretary in accordance with his instructions (NCPI 66), to carry out a purpose declared by him to be an integral part of the Industrial Relations Program of the Navy Department.

B. ***Appellee was an employee of the federal government.***

Since appellee was employed by a government instrumentality, it follows necessarily that he must be considered to be an employee of the federal government and, as such, must look to the compensation benefits provided him as his exclusive remedy for injuries incurred in the course of his employment.[3] We have shown that appellee was employed by an agency which is an integral part of the Department of the Navy even though it is not operated on funds of the United States Treasury. Such instrumentalities have full governmental immunity from taxation and from suit. This proposition was made clear by the decision of the Supreme Court in *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, holding that Army post exchanges (non-appropriated fund instrumentalities) are "arms of the Government" and "integral parts of the War Department" and that they therefore "partake of whatever immunities [the War Depart-

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[3] We show *infra*, pp. 19-21, that appellee's compensation benefits are his exclusive remedy against the United States regardless of how his employment relationship to the Government is characterized.

ment] may have under the Constitution and the federal statutes." 316 U.S. at 485. See also *Nimro* v. *Davis*, *supra*; *Borden* v. *United States*, 116 F. Supp. 873 (Ct. Cls.).

Congress has confirmed the status of civilian employees of non-appropriated fund instrumentalities as employees of the federal government. Following the decision in *Standard Oil Co.* v. *Johnson*, *supra*, the Civil Service Commission concluded that such employees were subject to the laws and regulations administered by the Commission, and the Department of Defense pointed up the difficulties inherent in this view (H.R. Rep. No. 1995, 82d Cong., 2d Sess. 3-4):

> To place such employees under civil-service rules and regulations would be detrimental to the operations involved and would impose a substantial hardship upon the normal operations of agencies engaged in nonappropriated fund activities. Since installation population is subject to rapid change it is necessary to operate exchanges to meet existing needs. At times it is necessary to employ and release these workers on a daily basis. Subjecting these employees to the laws pertaining to civil service would be a definite handicap to both these workers and the employing agency and would retard recruitment and add to the financial and administrative burden of the operation.

Because of this problem, Congress passed the Act of June 19, 1952, 66 Stat. 138, 5 U.S.C. 150k, providing:

> * * * We think that relationship is such as to constitute the Board an arm of the Government, performing a governmental function as an integral part of the Navy Department, made up of the Department's own personnel, acting officially under authority and direction of the Secretary in accordance with his instructions (NCPI 66), to carry out a purpose declared by him to be an integral part of the Industrial Relations Program of the Navy Department.

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An Act

To confirm the status of certain civilian employees of nonappropriated fund instrumentalities under the Armed Forces with respect to laws administered by the Civil Service Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that civilian employees, compensated from nonappropriated funds, of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States *for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act* (39 Stat. 742), as amended (5 U.S.C. 751) and the following: *Provided, That the status of these nonappropriated fund activities as Federal Instrumentalities shall not be affected.* [Emphasis added.]

This statute makes it clear that employees of nonappropriated fund instrumentalities are federal employees and that special legislation was needed to remove them from the coverage of the civil service laws and the Federal Employees Compensation Act. But the status of the activities as federal instrumentalities is expressly left unaffected. In addition, in Section 2 of the Act (5 U.S.C. 150k-1), Congress

required that the instrumentalities provide "their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment," in lieu of the benefits of the Federal Employees Compensation Act. These provisions obviously do not strip the government employees involved of all of the attributes of federal employment.

Further evidence of this congressional understanding can be found in a recent amendment to this statute which makes the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901-50) applicable to civilian employees of non-appropriated fund instrumentalities of the military departments.[4] Pub. L. No. 85-538, 85th Cong., 2d Sess. (July 18, 1958), 72 Stat. 397. In the House of Representatives report supporting this legislation it is recognized that while such employees do not have the benefits of the Federal Employees Compensation Act, they are "Federal public servants in all respects" with the exceptions here discussed.[5] Furthermore, as in the Federal Employees Compensation Act, the

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[4] This amendment is not applicable to the appellee for the sole reason that it operates prospectively only.

[5] Compare *Daniels* v. *Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill.), with *Faleni* v. *United States*, 125 F. Supp. 630 (E.D. N.Y.). The former case held that employees of non-appropriated fund instrumentalities are employees of the United States but nevertheless have a remedy under the Tort Claims Act. The latter case held that such employees are not federal employees, on the ground that neither their salaries nor compensation insurance is paid for out of appropriated funds. In our view, both cases ignore the considerations which we set forth here.

remedy provided by this legislation "shall be exclusive and in the place of all other liability of the United States." H. R. Rep. No. 1659, 85th Cong., 2d Sess. 4-5.[6]

C. ***The compensation benefits provided appellee by the Government through its instrumentality constitute his exclusive remedy against the United States.***

1. *Employees of the United States are precluded from maintaining suits under the Tort Claims Act.* It is now well established that employees of the United States, civilian as well as military, cannot maintain suits under the Tort Claims Act for damages incurred in the course of performing their duties. E.g., *Johansen* v. *United States*, 343 U.S. 427; *Feres* v. *United States*, 340 U.S. 135; *Lewis* v. *United States*, 190 F. 2d 22 (C.A. D.C.), certiorari denied, 342 U.S. 869. In the *Johansen* case, the Supreme Court affirmed the dismissal of a suit against the United States brought by a civilian seaman to recover for injuries incurred in his employment aboard a public vessel and allegedly caused by the negligence of the United States. The Court held

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[6] The statute provides:

> * * * Such liability shall be exclusive and in the place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any person otherwise entitled to recover damages from the United States or such nonappropriated fund instrumentality on account of such disability or death in any direct judicial proceedings, in a civil action, or in admiralty, or by proceedings whether administrative or judicial, under any workmen's compensation law or under any Federal tort liability statute.

that since the injuries of the seaman were covered by the Federal Employees Compensation Act, suit would not lie against the Government under the Public Vessels Act even though the Compensation Act did not at that time expressly provide that its benefits constituted the injured employee's exclusive remedy. Similarly, in the *Feres* case, the Supreme Court held that a member of the armed forces could not maintain a suit under the Tort Claims Act for injuries sustained while in the performance of his duty. The Court noted that Congress had provided a system "of simple, certain and uniform compensation for injuries or death" (340 U.S. at 144) and construed the Tort Claims Act "to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." (340 U.S. at 139.) And in the *Lewis* case, the Court of Appeals for the District of Columbia Circuit rendered a similar decision with respect to a member of the United States Park Police. The unique relationship of these employees to the Government they serve, and the broad system of administrative remedies which Congress has provided to compensate them for damages arising out of their employment, preclude resort to the courts for any compensatory relief.

Congress itself has recognized and given effect to this general principle by a 1949 amendment to the Federal Employees Compensation Act which made express the formerly implied rule that the remedy provided by that statute for personal injuries sus-

tained in the course of employment was exclusive. 63 Stat. 861, 5 U.S.C. 757(b); see S. Rep. No. 836, 81st Cong., 1st Sess., 23. The *Johansen* and *Feres* cases make it clear that this exclusiveness clause is merely expressive of what would, even in its absence, be held to be an incident of federal employment. See also *United States* v. *Brooks*, 169 F. 2d 840, reversed on other grounds, 337 U.S. 49.

As noted *supra*, pp. 12-13, in the case of employees of non-appropriated fund instrumentalities, Congress has provided a compensation system for injuries or death sustained in the course of employment by establishing a statutory requirement that the instrumentalities furnish such compensation by insurance or otherwise. 5 U.S.C. 150k. The obvious purpose of this requirement, and the simultaneous exemption of employees in this category from the coverage of the Federal Employees Compensation Act, is to insure that the employees have a normal compensation remedy against their employer and, at the same time, to shift the financial burden from public to non-appropriated funds. The compensation which the instrumentalities are required to furnish must be "not less than that provided by the laws of the State (or the District of Columbia) in which the employing activity of any such instrumentality is located." [7] The remedy against the Government is thus as complete as the remedy against a private employer under

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[7] Federal legislation was necessary since instrumentalities of the Government cannot be regulated by state workmen's compensation statutes. *E.g.*, *Humphrey* v. *Poss*, 245 Ala. 11, 15 So. 2d 732.

local law. And in the recent amendment to the statute (see pp. 13-14, *supra*), Congress again made express the formerly implied rule that the compensation remedy is exclusive and in place of all other liability of the United States.

The history of this legislation is thus the exact parallel of the Federal Employees Compensation Act which applies to the great bulk of federal employees compensated from appropriated funds. In both cases, the compensation remedy is the exclusive remedy, and in both cases Congress by amendment to the statute has confirmed prior judicial doctrine. If the appellee were permitted to prevail in this litigation, he would be obtaining an additional remedy which, under the express terms of the statute as it now reads, Congress has declared should not be available.

2. *Compensation benefits constitute an employee's exclusive remedy against his employer under California law.* The principle of the *Johansen* and *Feres* cases—that compensation benefits are the exclusive remedy against the Government for federal employees injured in the course of their employment—conforms with the express policy of the Federal Employees Compensation Act, the recent amendment to 5 U.S.C. 150k, and virtually every state workmen's compensation law, including the law of the State of California, where the appellee's injuries occurred. Under Section 3601 of the California Labor Code, an employee is precluded from bringing a tort action against his employer for compensated injuries. See *Duprey* v. *Shane*, 39 Cal. 2d 781, 789-90, 249 P. 2d

8, 13. It is for this reason that the district court committed error in ruling that under California law, liability would be imposed upon the United States if it were a private person.

Of course, under the Tort Claims Act, the Government incurs liability for injury only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). For this reason, the exclusiveness clause of the California compensation statute precludes recovery by the appellee in this case. It is undisputed that he was awarded full medical and disability payments by the Industrial Accident Commission of the State of California pursuant to the California compensation system (R. 16). Thus, the California State Fund Insurance Company received a lien in the amount of $4,085.76 against the judgment entered in appellee's favor (R. 17). These compensation payments constitute the Cafeteria System's complete compliance with the requirements of federal statute (5 U.S.C. 150k) and constitute a normal compensation remedy for the appellee. Since a private employer in California could incur no tort liability for the injuries involved here, the United States cannot be burdened with such liability. Any other result flouts the express terms of the Tort Claims Act. The correctness of our position thus rests, not only upon a construction of the Tort Claims Act which will fit it "into the entire statutory system of remedies against the Government," in accordance with the *Johansen* and *Feres*

cases, but upon the very terms of that statute, under which the Government's tort liability can be no greater than that of a private person similarly situated.

3. *Compensation benefits are appellee's exclusive remedy against the United States regardless of how his employment relationship to the Government is defined.* We believe it is clear that the appellee, as an employee of a non-appropriated fund instrumentality of the United States, was an employee of the federal government precluded, like all other federal employees, from maintaining a suit under the Tort Claims Act. However, regardless of how his employment relationship to the United States is characterized, appellee's compensation benefits constitute his exclusive remedy against the Government for injuries sustained in the course of his employment. This was the holding of a recent decision of the Court of Appeals for the District of Columbia Circuit (opinion by Justice Reed). *Aubrey* v. *United States*, 254 F. 2d 768. In the *Aubrey* case, a civilian employee of a Naval Officers' Mess (a non-appropriated fund activity) brought suit under the Tort Claims Act for injuries sustained from a fall in a government building. As was true of the appellee here, Aubrey received medical and disability payments for the injuries under a compensation insurance policy provided by the Mess as required by 5 U.S.C. 150k. The court of appeals affirmed the judgment of dismissal entered in favor of the Government by the district court.

The decision of the court of appeals was not based

on the fact that Aubrey was a government employee since the parties had stipulated that he was not such an employee at the time of his injury. The Government unsuccessfully argued that the real meaning of the stipulation was that Aubrey was not a government employee only for the purposes of the civil service laws and the Federal Employees Compensation Act, *i.e.*, that he was the kind of government employee described in 5 U.S.C. 150k, *supra* p. 12. The court of appeals held the Government to a strict reading of the stipulation but nevertheless ruled that "the compensation provided by the Officers' Mess, an instrumentality of the United States, was Aubrey's exclusive remedy against the United States." 254 F. 2d at 770. And this ruling was made prior to the 1958 amendment to the compensation statute which contains an exclusiveness clause. The court thus applied the rationale of the *Johansen* and *Feres* cases to employees of government instrumentalities regardless of whether or not they are considered employees of the United States. The court declared (254 F. 2d at 772):

> We conclude that Aubrey is precluded from maintaining this suit under the Tort Claims Act by the principle set forth in *Feres* and *Johansen* that the Act was not intended to grant the right to sue the Government to one who has been provided another remedy against its own instrumentality by the Government through a system 'of simple, certain and uniform compensation for injuries or death.' * * * We do not think the fact that the insurer is not the United States

but a private insurance carrier requires a distinction between this case and *Feres* or *Johansen*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case remanded with instructions to enter judgment for the United States.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
ROBERT H. SCHNACKE,
~~LLOYD H. BURKE~~,
United States Attorney,

MORTON HOLLANDER,
BERNARD CEDARBAUM,
Attorneys.

APPENDIX

Navy Civilian Personnel Instruction 66 provides in pertinent part:

Section 2

* * * *

2-1. PURPOSES OF EMPLOYEE SERVICES.—The purposes of an employee services program are to keep employees informed of the policies and rules established by management, to make available for them where necessary those facilities which reduce to a minimum interruptions of work for personal affairs, and to provide bases for the development and continuance of interest in their jobs and places of work.

2-2. DEPARTMENT POLICY.—It is the policy of the Department that a program of employee services based on the needs of the service be established in each naval activity. Only those services which contribute to morale, job interest, cooperation, better attendance, health, and productive output are considered justified under this program.

2-3. ORGANIZATION AND ADMINISTRATION.—a. *Principles of operation.*—Employee services are an integral part of the Industrial Relations Program, and as such should consist only of facilities which contribute to the efficiency of the service. In no case should services be instituted which are adequately provided by community resources and care must be exercised to avoid providing facilities which offer competition to private business in the community. The Department, nevertheless, is concerned with steady day-to-day attendance and production of its

employees, and where the absence of adequate community and business resources causes troublesome work interruptions, consideration should be given to the development of necessary employee services.

* * * *

Section 4

* * * *

4-1. General Statement.—It is the policy of the Department of the Navy to make available such assistance and facilities as are necessary so that employees may provide for themselves in-plant food service where necessary and practicable. Food service in general includes cafeterias, lunch counters, canteens, and vending machines, which will be operated in conformance with the provisions of this Section. Under certain conditions General Mess and Commissary Stores will be made available to employees as outlined in NCPI 66.4-5 and 4-6.

4-2. Administration of Food Service.—*a. Organization.*—Food service is operated for the benefit of all employees of an activity through the medium of employee representatives who determine operating policies and procedures, subject to approval of the head of the activity. Normally employee organization and participation may be initiated by the appointment by the head of the activity of a five to seven member Cafeteria Association. However, the commanding officer may determine under certain circumstances that it is in the best interest of the employees and the activity to have some or all of the members of the Cafeteria Association designated through an elective process, or nominated

by employee groups. In this manner employees and employee groups would be given the opportunity to select representatives responsible for the food service and its operation, subject to the provisions of this Section.

b. Function of Cafeteria Association.—The Cafeteria Association (or such other title as is selected) is responsible for developing, recommending, and executing plans for operation of the food service, subject to approval of the head of the activity. The Cafeteria Association may operate its food service either through employment of a manager or by entering into an agreement with a concessionaire.

c. Responsibility of Industrial Relations Officer.—As a representative of the head of the activity, and to coordinate the activities of the Cafeteria Association with other operations of the establishment, the Industrial Relations Officer is usually appointed as an ex-officio member of the Association. The Industrial Relations Officer, functioning in this capacity, shall advise and assist the Association, and act as immediate point of contact between the Association and the head of the activity.

4-3. Operation of Food Service.—*a. Operation by employment of a manager.*—Where the decision of the Association, as approved by the head of the activity, is that it would best serve the activity's interests to employ an operating manager rather than the services of a concessionaire, an appropriate directive or station order with copy to OIR 235 will be issued, setting forth the conditions of operation, and giving the

Cafeteria Association authority to use the facilities under the conditions prescribed in NCPI 66.4-4. It is suggested that in such a case the Cafeteria Association organize itself into a nonprofit corporation in order to avoid personal liability for operations in connection with the food service.

b. Operation by concessionaire.—Where the decision of the Cafeteria Association, as approved by the head of the activity, is to utilize the services of a concessionaire, any contract arrived at to secure such service should be negotiated between the Association and the concessionaire as the contracting parties, and should bear the signature of the head of the activity only as to approval of the terms of the contract and the use of the facilities. Such contract shall not obligate funds of the United States or otherwise bind the Government. Each contract will contain all provisions required by NCPI 66.4-4. A copy of each contract entered into will be forwarded to OIR 235 for post audit by the Office of the General Counsel. It is not necessary to secure prior approval on such contracts.

4-4. REQUIREMENTS OF OPERATORS.—*a. Conformance with laws.*—The food service shall be administered in compliance with all applicable state, municipal, and other local laws if such state, municipal, or other local government has jurisdiction over the area of the operation.

b. Taxation.—The food service shall pay, as and when due, any and all taxes becoming due by virtue of the operation of such food service, including, but not limited to, all real estate or other taxes which may be held to be properly

imposed on its possessory interest in the right to use the government premises. When the association employs a manager, it is considered a non-profit cooperative for tax purposes.

c. Cash sales.—All sales are to be for cash, and credit in any form is to be prohibited.

d. Audits.—Semi-annual or more frequent audits of the food service shall be made and submitted to the head of the activity. These audits should be made by an independant certified public accountant, and at the expense of the food service operator. In small activities, or in unusual circumstances, the head of the activity may direct station personnel to perform this duty.

e. Earnings.—The head of the activity shall establish a reasonable maximum rate of earnings for food service operations.

f. Use of profits.—Income from food service and associated services is to be used primarily for improving food service; secondarily for such welfare and recreation as will benefit the employees of the activity.

g. Insurance.—The Cafeteria Association or concessionaire shall maintain product, personal, and public liability insurance in amounts determined by the head of the activity.

h. Prohibited sales.—The sale of intoxicating liquors, beer, ale, or other intoxicating beverages, is prohibited except when expressly permitted by the Secretary of the Navy.

i. Equipment and fixtures.—Restaurant services may be operated in available government buildings. Necessary equipment, fixtures, cooking utensils, dishes, and silver may be furnished

or purchased by the government if funds are available. All such equipment shall remain the property of the government and responsibility for its inventory and replacement in initial condition, subject to reasonable wear and tear, shall rest with the user.

j. Property.—Title to all permanent improvements of government property shall be vested in the Government regardless of who makes them or causes them to be made.

k. Utilities.— * Utility services will be furnished by the Government to food service operators, but shall be paid for by the operator at the close of each month. The rates specified by paragraph 66405 of the Bureau of Supplies and Accounts Manual are applicable to cafeterias operated by concessionaires, while the rates specified by paragraph 67104 are applicable to cafeterias operated by managers. *

4-5. USE OF GENERAL MESS.—When facilities are not available to provide adequate food service, authority to use the general mess may be requested from the Bureau of Supplies and Accounts according to the provisions of Volume IV, Chapter 1, Section VI, Bureau of Supplies and Accounts Manual.

4-6. USE OF COMMISSARY STORE.—Civilian employees are authorized patrons of commissary stores outside the continental limits of the United States where the head of the activity so directs. The Secretary of the Navy may extend commissary privileges within the continental United States according to the provisions of Bureau of Supplies and Accounts Manual, Volume IV,

Chapter 4, Part G, Section II. Requests for such privileges shall be submitted to the Chief, Bureau of Supplies and Accounts.

TABLE OF EXHIBITS

Exhibit	*Transcript page*	*Record Page*
Plaintiff's # 1 (contract with officers' club)	65-66	77
Plaintiff's # 2 (compensation insurance policy endorsement)	68-69	79-80
Defendant's # A (photograph of stairway)	19-20	37-38
Defendant's # B (mess regulations)	41-42	56-57
Defendant's # C (Navy Civilian Personnel Instructions)	60	72

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